IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Luther Jernigan, Petitioner, vs. Charles L. Ryan, et al. Respondents.	No. CV-08-838-PHX-MHM (LOA) **REPORT AND RECOMMENDATION**

This matter is before the Court on Petitioner's Amended Petition for Writ of Habeas Corpus. (docket # 6) Respondents[1] have filed an Answer, docket # 13, to which Petitioner has replied, docket # 17.

I. Factual and Procedural Background

A. Factual Background

On August 3, 2005, a Maricopa County grand jury indicted Petitioner on one count of fraudulent schemes and artifices, one count of theft, one count of taking the identify of another, and three counts of forgery. (Respondents' Exh. A) The State also alleged that Petitioner had a 1994 felony conviction for attempted theft, a class 4 felony. (Respondents' Exh. B) The State subsequently amended the allegation of historical priors, asserting that Petitioner had three additional prior convictions in federal district court for: (1) dealing in

[1] Petitioner named Dora B. Schriro as a respondent in this matter. Charles L. Ryan, the current director of the Arizona Department of Corrections, is substituted for Dora B. Schriro pursuant to Fed.R.Civ.P. 25(d).

counterfeit obligations; (2) conspiracy to possess cocaine; and (3) unlawful possession of a firearm. (Respondents' Exh. C) The State also alleged that Petitioner committed the offenses charged in the indictment while on release from the federal convictions. (Respondents' Exh. D)

On December 7, 2005, Petitioner entered into a written plea agreement pursuant to which he pled guilty to: Amended Count 1, attempt to commit fraudulent schemes and artifices, a class 3 felony, with one prior felony conviction; and Amended Count 2, theft, a class 3 felony, non-dangerous and non-repetitive. (Respondents' Exh. E) In the plea agreement, Petitioner admitted his 1994 felony conviction for attempted theft. (Respondents' Exh. E) In exchange for Petitioner's plea, the remaining charges were dismissed. (*Id.*)

At the December 7, 2005 change-of-plea hearing, the court[2] inquired whether Petitioner had read the plea agreement, discussed it with counsel, and understood its terms. (Respondents' Exh. F at 4-6) Petitioner responded affirmatively. (*Id*.) Petitioner stated that he understood the plea agreement and that it contained everything to which he had agreed. (*Id*. at 6) Petitioner further stated that he entered the plea voluntarily, of his own free will, and that he was not forced or threatened to plead guilty. (Respondents' Exh. F at 6) The Court explained Petitioner's sentencing exposure on both counts, including a possible aggravated sentence of 16.5 years followed by community supervision. (Respondents' Exh. F at 6-7) Petitioner stated that he understood the sentencing range. (*Id.*) The court further explained the rights Petitioner was waiving by pleading guilty, and Petitioner indicated that he wished to forego those rights and enter a plea. (Respondents' Exh. F at 9-10)

Petitioner's counsel, Susan Maga, presented the following facts in support of Petitioner's guilty pleas. (Respondents' Exh. F at 2) As to Amended Count 1, Petitioner and co-defendant Tina Ricketts acted in concert to complete a mortgage with CSI Mortgage and Prescott Title on the Scottsdale home of Lucinda Maxfield, without Maxfield's

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[2] The Honorable Richard Gama presided.

knowledge or permission. (Respondents' Exh. F at 11) Petitioner had Ricketts pretend to be Maxfield and provided her with the blonde wig she wore when completing the mortgage paperwork. (Respondents' Exh. F at 11) After Petitioner and Ricketts received the money from the mortgage, Ricketts again pretended to be Maxfield when she obtained a wire transfer for some of the proceeds ($125,000) from the mortgage to a Bank of America account in the name of Richard Self (the "Self account"). (*Id*.) The Self account was actually controlled by Petitioner. (Respondents' Exh. F at 11) Additionally, both Ricketts and Petitioner were aware that David Robinson was paid money from the mortgage proceeds, in exchange for his agreement to conceal the mortgage fraud from Maxfield. (Respondents' Exh. F at 12) Petitioner admitted that the facts counsel provided in support of Amended Count 1 were true. (Respondents' Exh. F at 12)

In support of Amended Count 2, counsel stated that Petitioner committed theft by knowingly controlling, without lawful authority, CSI Mortgage's cash, with the intent of permanently depriving CSI of the money. (Respondents' Exh. F at 13) Petitioner controlled the money through the Richard Self bank account, to which Petitioner had access. (*Id*.) Petitioner also admitted that the theft involved sufficient monetary value to make the crime a class 3 felony. (Respondents' Exh. F at 13) Petitioner again attested to the truth of the facts counsel provided in support of Amended Count 2. (*Id.*)

The court found that Petitioner made the guilty pleas knowingly, intelligently, and voluntarily and accepted his pleas. (Respondents' Exh. F at 14)

Petitioner subsequently moved to withdraw from the plea agreement on the ground that the factual basis in support of Amended Count 1 was inaccurate. Due to differences that arose between Petitioner and his counsel over this issue, the court allowed Susan Maga to withdraw and replaced her with Terri Capozzi. (Respondents' Exhs. G, H)

At the beginning of the May 12, 2006 sentencing hearing, the court addressed the motion to withdraw the guilty pleas. (Respondents' Exh. I at 3) Petitioner's counsel, Capozzi, requested a continuance so she could secure the presence of four individuals whose testimony Petitioner wanted to present in support of his motion to withdraw. (Respondents'

Exh. I at 4) The court denied the motion to continue, noting that the matter had previously been continued. (*Id*.) The court clarified that the motion to withdraw was before the court for "oral argument" and declined counsel's request that Petitioner testify. (Respondents' Exh. I at 4) During oral argument, Petitioner's then-counsel, Capozzi, argued that former counsel, Maga, had permitted Petitioner to plead guilty based on "an incorrect and inaccurate factual basis," which that constituted the "manifest injustice that's required to set aside a guilty plea." (Respondents' Exh. I, Tr. 5/12/06 at 7) Counsel explained that Petitioner's "position is and has been . . .that he never provided a wig or disguise for Tina Ricketts." (Respondents' Exh. I at 6) Counsel Capozzi further argued that Petitioner had conveyed this information to his former counsel, Maga, but she ignored him. (Respondents' Exh. I at 7) The State argued that, during the change-of-plea proceeding, Petitioner was given several opportunities to express any disagreement with the asserted factual basis, but said nothing. (Respondents' Exh. I at 8-10) The court found that Petitioner did not satisfy his burden of showing manifest injustice, and denied the motion to withdraw from the plea agreement. (Respondents' Exh. I at 12)

The court then proceeded to sentencing. The court found that Petitioner had been convicted in 1994 of the alleged prior felony. (Respondents' Exh. I at 13) The State requested an "extremely aggravated term" based on Petitioner's background and the facts of the case. (Respondents' Exh. I at 15-17) Defense counsel argued that the court should impose "no more than [the] presumptive" sentence. (*Id*. at 22) The court concluded that an aggravated sentence was appropriate on Count 1, finding three aggravating factors: the prior felony conviction admitted in the plea agreement, the presence of an accomplice, and the offense was for pecuniary gain. (Respondents' Exh. I at 22) Accordingly, the court sentenced Petitioner to an aggravated term of 16.25 years' imprisonment on Count 1. (*Id*. at 23), see A.R.S. § 13-702.01(C)(1).

On Count 2, the court suspended the imposition of sentence and placed Petitioner on supervised probation for 5 years to begin after Petitioner's discharge from prison on Count 1. (*Id*. at 25)

B. First Post-Conviction Proceeding

On June 16, 2006, Petitioner filed a notice of post-conviction relief and requested appointment of counsel. (Respondents' Exh. J) The court appointed counsel who filed a petition for post-conviction relief on December 20, 2006. (Respondents' Exh. K) The trial court denied relief on April 12, 2007. (Respondents' Exh. L)

On May 31, 2007, Petitioner filed a petition for review in the Arizona Court of Appeals, 1 CA-CR 07-0472 PRPC. (Respondents' Exh. M) On February 5, 2008, the Court of Appeals denied review. (Respondents' Exh. N) Petitioner did not seek review in the Arizona Supreme Court. (docket # 6 at 6-9)

C. Second Post-Conviction Proceeding

On August 27, 2007, Petitioner filed a second petition for post-conviction relief. (Respondents' Exh. O) On September 21, 2007, the trial court found Petitioner's claims precluded, pursuant to Ariz.R.Crim.P. 32.2(a). (Respondents' Exh. P) The court also rejected Petitioner's argument that "newly-discovered" facts entitled him to relief. The court noted that Petitioner could have discovered the information before pleading guilty, and that by pleading guilty, he waived his right to contest the evidence against him. (*Id.*)

On or about October 16, 2007, Petitioner filed a *pro se* petition for review to the Arizona Court of Appeals, 1 CA-CR 07-0872 PRPC. (Respondents' Exh. Q) On March 12, 2008, the Arizona Court of Appeals denied review. (Respondents' Exh. R) Petitioner did not seek review in the Arizona Supreme Court. (docket # 6 at 6-9)

D. Petition for Writ of Habeas Corpus

On August 15, 2008, Petitioner filed a timely amended petition for writ of habeas corpus in this Court. (docket # 6; docket # 13 at 6) Petitioner raises the following claims: (1) "Violation of due process of law under the Fourteenth Amendment to the United States Constitution. Petitioner can show manifest injustice has occurred and trial court refused to hold an evidentiary hearing to allow Petitioner to withdraw from the plea;" (2) Petitioner received ineffective assistance of counsel and suffered a "manifest injustice" because counsel provided an incorrect factual basis for his guilty plea; and (3) Petitioner received

ineffective assistance of counsel because counsel (a) failed to subpoena witnesses to testify in support of his motion to withdraw his guilty plea, and (b) failed to object to the aggravated sentence. (docket # 6)

II. Exhaustion

Respondents assert that Petitioner has procedurally defaulted Ground Two and a portion of Ground Three, and that those claims are barred from federal habeas corpus review. As discussed below, the Court agrees.

A. Relevant Law

A federal court may not grant a petition for writ of habeas corpus unless the petitioner has exhausted the state remedies available to him. 28 U.S.C. § 2254(b). When seeking habeas relief, petitioner bears the burden of showing that he has properly exhausted each claim. *Cartwright v. Cupp*, 650 F.2d 1103, 1104 (9th Cir. 1981)(*per curiam*). The exhaustion inquiry focuses on the availability of state remedies at the time the petition for writ of habeas corpus is filed in federal court. *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). The prisoner "shall not be deemed to have exhausted . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). In other words, proper exhaustion requires the prisoner to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. 845. "One complete round" includes filing a "petition[] for discretionary review when that review is part of the ordinary appellate review procedure in the State." *Id.* State prisoners may skip a procedure occasionally employed by a state's courts to provide relief only if a state law or rule precludes use of the procedure, or the "State has identified the procedure as outside the standard review process and has plainly said that it need not be sought for purposes of exhaustion. *Id.* at 848, 850.

To exhaust state remedies, a petitioner must afford the state courts the opportunity to rule upon the merits of his federal claims by "fairly presenting" them to the state's "highest" court in a procedurally appropriate manner. *Castille v. Peoples*, 489 U.S. 346, 349 (1989);

Baldwin v. Reese, 541 U.S. 27, 29 (2004) (stating that "[t]o provide the State with the necessary 'opportunity,' the prisoner must "fairly present" her claim in each appropriate state court . . . thereby alerting the court to the federal nature of the claim."). In Arizona, unless a prisoner has been sentenced to death, the "highest court" requirement is satisfied if the petitioner has presented his federal claim to the Arizona Court of Appeals either on direct appeal or in a petition for post-conviction relief. *Crowell v. Knowles* , 483 F.Supp.2d 925 (D.Ariz. 2007) (discussing *Swoopes v. Sublett*, 196 F.3d 1008, 1010 (9th Cir. 1999)). Contrary to Respondents' assertion, Petitioner was not required to present his claims to the Arizona Supreme Court.

In addition to presenting his claims to the proper court, a state prisoner must fairly present his claims to that court to satisfy the exhaustion requirement. A claim is "fairly presented" in state court only if a petitioner has described both the operative facts and the federal legal theory on which his claim is based. *Reese*, 541 U.S. at 28. It is not enough that all of the facts necessary to support the federal claim were before the state court or that a "somewhat similar" state law claim was raised. *Reese*, 541 U.S. at 28 (stating that a reference to ineffective assistance of counsel does not alert the court to federal nature of the claim). Rather, the habeas petitioner must cite in state court to the specific constitutional guarantee upon which he bases his claim in federal court. *Tamalini v. Stewart*, 249 F.3d 895, 898 (9th Cir. 2001). Similarly, general appeals to broad constitutional principles, such as due process, equal protection, and the right to a fair trial, are insufficient to establish fair presentation of a federal constitutional claim. *Lyons v. Crawford*, 232 F.3d 666, 669 (9th Cir. 2000), *amended on other grounds*, 247 F.3d 904 (9th Cir. 2001); *Shumway v. Payne*, 223 F.3d 982, 987 (9th Cir. 2000) (insufficient for prisoner to have made "a general appeal to a constitutional guarantee," such as a naked reference to "due process," or to a "constitutional error" or a "fair trial"). Likewise, a mere reference to the "Constitution of the United States" does not preserve a federal claim. *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996). Even if the basis of a federal claim is "self-evident" or if the claim would be decided "on the same considerations" under state or federal law, the petitioner must make

the federal nature of the claim "explicit either by citing federal law or the decision of the federal courts . . . ." *Lyons*, 232 F.3d at 668. A state prisoner does not fairly present a claim to the state court if the court must read beyond the pleadings filed in that court to discover the federal claim. *Baldwin*, 541 U.S. at 27.

In sum, "a petitioner fairly and fully presents a claim to the state court for purposes of satisfying the exhaustion requirement if he presents the claim: (1) to the proper forum, (2) through the proper vehicle, and (3) by providing the proper factual and legal basis for the claim." *Insyxiengmay v. Morgan*, 403 F.3d 657, 668 (9th Cir. 2005)(citations omitted).

A habeas petitioner's claims may be precluded from federal review in either of two ways. First, a claim may be procedurally defaulted in federal court if it was actually raised in state court but found by that court to be defaulted on state procedural grounds such as waiver or preclusion. *Ylst v. Nunnemaker*, 501 U.S. 797, 802-05 (1991); *Coleman*, 501 U.S. at 729-30. Thus, a state prisoner may be barred from raising federal claims that he did not preserve in state court by making a contemporaneous objection at trial, on direct appeal, or when seeking post-conviction relief. *Bonin v. Calderon*, 59 F.3d 815, 842 (9th Cir. 1995) (stating that failure to raise contemporaneous objection to alleged violation of federal rights during state trial constitutes a procedural default of that issue); *Thomas v. Lewis*, 945 F.2d 1119, 1121 (9th Cir. 1991) (finding claim procedurally defaulted where the Arizona Court of Appeals held that habeas petitioner had waived claims by failing to raise them on direct appeal or in first petition for post-conviction relief.) If the state court also addressed the merits of the underlying federal claim, the "alternative" ruling does not vitiate the independent state procedural bar. *Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989); *Carringer v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992) (state supreme court found ineffective assistance of counsel claims "barred under state law," but also discussed and rejected the claims on the merits, *en banc* court held that the "on-the-merits" discussion was an "alternative ruling" and the claims were procedurally defaulted and barred from federal review). A higher court's subsequent summary denial of review affirms the lower court's application of a procedural bar. *Nunnemaker*, 501 U.S. at 803.

The second procedural default scenario arises when a state prisoner failed to present his federal claims to the state court, but returning to state court would be "futile" because the state courts' procedural rules, such as waiver or preclusion, would bar consideration of the previously unraised claims. *Teague v. Lane*, 489 U.S. 288, 297-99 (1989); *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002); *State v. Mata*, 185 Ariz. 319, 322-27, 916 P.2d 1035, 1048-53 (1996); Ariz. R. Crim. P. 32.2(a) & (b); Ariz. R. Crim. P. 32.1(a)(3) (post-conviction review is precluded for claims waived at trial, on appeal, or in any previous collateral proceeding); 32.4(a); Ariz. R. Crim. P. 32.9 (stating that petition for review must be filed within thirty days of trial court's decision). A state post-conviction action is futile where it is time-barred. *Beaty*, 303 F.3d at 987; *Moreno v. Gonzalez*, 116 F.3d 409, 410 (9th Cir. 1997) (recognizing untimeliness under Ariz. R. Crim. P. 32.4(a) as a basis for dismissal of an Arizona petition for post-conviction relief, distinct from preclusion under Rule 32.2(a)). This type of procedural default is known as "technical" exhaustion because although the claim was not actually exhausted in state court, the petitioner no longer has an available state remedy. *Coleman*, 501 U.S. at 732 ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no remedies any longer 'available' to him.").

In either case of procedural default, federal review of the claim is barred absent a showing of "cause and prejudice" or a "fundamental miscarriage of justice." *Dretke v. Haley*, 541 U.S. 386, 393-94, (2004); *Murray v. Carrier*, 477 U.S. 478, 488 (1986). To establish "cause," a petitioner must establish that some objective factor external to the defense impeded his efforts to comply with the state's procedural rules. *Id*. The following objective factors may constitute cause: (1) interference by state officials, (2) a showing that the factual or legal basis for a claim was not reasonably available, or (3) constitutionally ineffective assistance of counsel. *Id.* Ordinarily, the ineffective assistance of counsel in collateral proceedings does not constitute cause because "the right to counsel does not extend to state collateral proceedings or federal habeas proceedings." *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1306 (9th Cir. 1996).

Prejudice is actual harm resulting from the constitutional violation or error. *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984). To establish prejudice, a habeas petitioner bears the burden of demonstrating that the alleged constitutional violation "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." *United States v. Frady*, 456 U.S. 152, 170 (1982); *Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir. 1996). Where petitioner fails to establish cause, the court need not reach the prejudice prong.

A federal court may also review the merits of a procedurally defaulted claim if petitioner demonstrates that failure to consider the merits of his claim will result in a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). A "fundamental miscarriage of justice" occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Id.* To satisfy the "fundamental miscarriage of justice" standard, petitioner must establish that it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt in light of new evidence. *Schlup*, 513 U.S. at 327; 28 U.S.C. § 2254(c)(2)(B). Even if petitioner asserts a claim of actual innocence to excuse his procedural default of a federal claim, federal habeas relief may not be granted absent a finding of an independent constitutional violation occurring in the state criminal proceedings. *Dretke*, 541 U.S. at 393-94.

B. Application of Law to Petitioner's Claims

1. Ground One

In Ground One, Petitioner asserts a due process violation under the Fourteenth Amendment. Petitioner argues that the factual basis provided by his counsel at the change-of-plea hearing was incorrect and that the trial court refused to conduct an evidentiary hearing on Petitioner's motion to withdraw his guilty pleas on that basis. (docket # 6 at 6) In his first petition for post-conviction relief, Petitioner alleged a federal due process violation based on counsel's failure to provide an accurate factual basis and the trial court's failure to hold an evidentiary hearing on the motion to withdraw the guilty plea. (Respondents' Exh. K at 6) The trial court rejected these claims. Petitioner raised the same

claims to the Arizona Court of Appeals. (Respondents' Exh. M at 3, 6) Thus, Petitioner properly exhausted Ground One.

2. Ground Two

In Ground Two, Petitioner argues that counsel was ineffective for providing an incorrect factual basis for his guilty pleas. (docket # 6 at 7, 12) Petitioner's first petition for post-conviction relief also asserted a claim that trial counsel was ineffective for "providing an incorrect factual basis." (Respondents' Exh. K at 6, 7) However, Petitioner did not assert this claim in his petition for review to the Arizona Court of Appeals. (Respondents' Exh. M at 3, 6-7) Accordingly, Petitioner did not properly present Ground Two to the state courts and that claim is procedurally defaulted.

3. Ground Three

In Ground Three, Petitioner asserts a claim of ineffective assistance of counsel based on: (a) counsel's failure to subpoena witnesses for the motion-to-withdraw/sentencing hearing; and (b) not objecting to the trial court's failure give advance notice that it intended to impose an exceptionally-aggravated sentence. (docket # 6 at 8) Petitioner raised both of these claims in his first petition for post-conviction relief. (Respondents' Exh. K at 8) In his petition for review to the Arizona Court of Appeals, Petitioner challenged counsel's failure to subpoena witnesses but did not challenge counsel's failure to object to Petitioner's aggravated sentence. (Respondents' Exh. M at 3, 7) Accordingly, Petitioner did not properly present to the state courts his claim that counsel was ineffective for failing to object to the aggravated sentence. Thus, he has procedurally defaulted Ground 3(b).

C. Procedural Bar

Petitioner's claims in Grounds 2 and Ground 3(b) are technically exhausted and procedurally barred, because a return to state court to present those claims would be futile because they would be procedurally barred pursuant to Arizona law. First, Petitioner is time-barred under Arizona law from raising these claims in a successive petition for post-conviction relief because the time for filing a notice of post-conviction relief has long expired. *See* Ariz.R.Crim.P. 32.1 and 32.4 (a petition for post-conviction relief must be filed

"within ninety days after the entry of judgment and sentence or within thirty days after the issuance of the order and mandate in the direct appeal, whichever is later.") Although Rule 32.4 does not bar dilatory claims if they fall within the category of claims specified in Ariz.R.Crim.P 32.1(d) through (h), Petitioner has not asserted that any of these exceptions apply to him. Moreover, a state post-conviction action is futile where it is time-barred. *Beaty v. Stewart*, 303 F.3d 975, 987 (9th Cir. 2002); *Moreno v. Gonzalez*, 116 F.3d 409, 410 (9th Cir. 1997) (recognizing untimeliness under Ariz. R. Crim. P. 32.4(a) as a basis for dismissal of an Arizona petition for post-conviction relief, distinct from preclusion under Rule 32.2(a)).

Furthermore, under Rule 32.2(a) of the Arizona Rules of Criminal Procedure, a defendant is precluded from raising claims that could have been raised on direct appeal or in any previous collateral proceeding. *See Krone v. Hotham*, 181 Ariz. 364, 366, 890 P.2d 1149, 1151 (1995) (capital defendant's early petition for post-conviction relief raised limited number of issues and waived other issues that he could have then raised, but did not); *State v. Curtis*, 185 Ariz. 112,113, 912 P.2d 1341, 1342 (App. 1995) ("Defendants are precluded from seeking post-conviction relief on grounds that were adjudicated, or could have been raised and adjudicated, in a prior appeal or prior petition for post-conviction relief."); *State v. Berryman*, 178 Ariz. 617, 624, 875 P.2d 850, 857 (App. 1994) (defendant's claim that his sentence had been improperly enhanced by prior conviction was precluded by defendant's failure to raise issue on appeal). The claims asserted in Grounds 2 and 3(b) could have, and should have, been properly raised on post-conviction review. Accordingly, the State court would find those claims procedurally barred.

1. Cause and Prejudice

As set forth above, Petitioner's claims in Grounds 2 and 3(b) are procedurally defaulted and barred from federal habeas review absent a showing of "cause and prejudice" or a "fundamental miscarriage of justice."

To establish "cause," a petitioner must establish that some objective factor external to the defense impeded his efforts to comply with the state's procedural rules. *Murray*, 477

U.S. at 488-492. The following objective factors may constitute cause: (1) interference by state officials, (2) a showing that the factual or legal basis for a claim was not reasonably available, or (3) constitutionally ineffective assistance of counsel. *Id.* Prejudice is actual harm resulting from the constitutional violation or error. *Magby v. Wawrzaszek*, 741 F.2d 240, 244 (9th Cir. 1984). Where petitioner fails to establish cause for his procedural default, the court need not consider whether petitioner has shown actual prejudice resulting from the alleged constitutional violations. *Smith v. Murray*, 477 U.S. 527, 533 (1986).

Petitioner does not assert any specific basis to overcome the procedural bar. (docket # 17) Rather, he generally argues that he is *pro se* and lacks legal assistance. Petitioner's *pro se* status and ignorance of the law do not satisfy the cause standard. *Hughes v. Idaho State Bd. of Corrections*, 800 F.2d 905, 908 (9th Cir. 1986); *Tacho v. Martinez*, 862 F.2d 1376, 1381 (9th Cir. 1988). Because Petitioner offers no legitimate "cause" which precluded him from properly exhausting his state remedies, the Court declines to reach the issue of prejudice. *Engle*, 456 U.S. at 134 n. 43.

2. Fundamental Miscarriage of Justice

Additionally, Petitioner has not shown that failure to consider his claims raised in Grounds 2 and 3(b) will result in a fundamental miscarriage of justice. A federal court may review the merits of a procedurally defaulted habeas claim if the petitioner demonstrates that failure to consider the merits of his claim will result in a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). A "fundamental miscarriage of justice" occurs when a constitutional violation has probably resulted in the conviction of one who is actually innocent. *Id.*

This gateway "actual innocence" claim differs from a substantive actual innocence claim. *Smith v. Baldwin*, 466 F.3d 805, 811-12 (9th Cir. 2006). The Supreme Court described the gateway showing in *Schlup*, 513 U.S. at 315-16, as a less stringent standard than a substantive claim of actual innocence. *See also Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997) (suggesting that a "habeas petitioner asserting a freestanding innocence claim must go beyond demonstrating doubt about his guilt and must affirmatively prove that

he is innocent."). If Petitioner passes through the *Schlup* gateway, the court is only permitted to review his underlying constitutional claims. *Smith*, 466 F.3d at 807. The fundamental miscarriage of justice exception applies only to a "narrow class of cases" in which a petitioner makes the extraordinary showing that an innocent person was probably convicted due to a constitutional violation. *Schlup v. Delo*, 513 U.S. 298, 231 (1995). To demonstrate a fundamental miscarriage of justice, Petitioner must show that "a constitutional violation has resulted in the conviction of one who is actually innocent." *Schlup*, 513 U.S. at 327. To establish the requisite probability, Petitioner must prove with new reliable evidence that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 324, 327. New evidence presented in support of a fundamental miscarriage of justice may include "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial." *Id.* at 324, *see also*, *House v. Bell*, 547 U.S. 518 (2006) (stating that a fundamental miscarriage of justice contention must involve evidence that the trial jury did not have before it).

Petitioner has not established that, in light of newly discovered evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 324, 327.

III. Analysis

The Court will consider the merits of Petitioner's claims after setting forth the standard of review. As discussed below, whether or not procedurally defaulted, all of Petitioner's claims lack merit. *See* 28 U.S.C. § 2254(b)(2) (stating that the court may deny a petition for writ of habeas corpus on the merits "notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.") *Id.*

A. Standard of Review

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA") which "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court

convictions are given effect to the extent possible under the law." *Bell v. Cone*, 535 U.S. 685, 693 (2002).

Under the AEDPA, a federal court may not grant a habeas petition "with respect to any claim that was adjudicated on the merits in state court" unless the state court's decision was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1),(2); *Carey v. Musladin*, 549 U.S. 70 (2006); *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003); *Mancebo v. Adams*, 435 F.3d 977, 978 (9th Cir. 2006). To determine whether a state court ruling was "contrary to" or involved an "unreasonable application" of federal law, courts look exclusively to the holdings of the Supreme Court which existed at the time of the state court's decision. *Mitchell v. Esparza*, 540 U.S. 12, 15-15 (2003); *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003). Accordingly, the Ninth Circuit has acknowledged that it cannot reverse a state court decision merely because that decision conflicts with Ninth Circuit precedent on a federal constitutional issue. *Brewer v. Hall*, 378 F.3d 952, 957 (9th Cir. 2004); *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003).

Even if the state court neither explained its ruling nor cited United States Supreme Court authority, the reviewing federal court must nevertheless examine Supreme Court precedent to determine whether the state court reasonably applied federal law. *Early v. Packer*, 537 U.S. 3, 8 (2003). The United States Supreme Court has expressly held that citation to federal law is not required and that compliance with the habeas statute "does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.*

A state court's decision is "contrary to" federal law if it applies a rule of law "that contradicts the governing law set forth in [Supreme Court] cases or if it confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Mitchell v. Esparza*, 540 U.S 12, 14 (2003) (citations omitted); *Williams v. Taylor*, 529 U.S. 362, 411

(2000).

A state court decision is an "unreasonable application of" federal law if the court identifies the correct legal rule, but unreasonably applies that rule to the facts of a particular case. *Williams*, 529 U.S. at 405; *Brown v. Payton*, 544 U.S. 133, 141 (2005). An incorrect application of federal law does not satisfy this standard. *Yarborough v. Alvarado*, 541 U.S. 652, 665-66 (2004) (stating that "[r]elief is available under § 2254(d)(1) only if the state court's decision is objectively unreasonable.") "It is not enough that a federal habeas court, in its independent review of the legal question," is left with the "firm conviction" that the state court ruling was "erroneous." *Id.*; *Andrade*, 538 U.S. at 75. Rather, the petitioner must establish that the state court decision is "objectively unreasonable." *Middleton v. McNeil*, 541 U.S. 433 (2004); *Andrade*, 538 U.S. at 76.

In conducting an analysis under the AEDPA, the habeas court considers the last reasoned state court decision addressing the claim. *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991). Additionally, the habeas court presumes that the state court's factual determinations are correct and petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1) (stating that "a determination of factual issues made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."); *Williams v. Rhoades*, 354 F.3d 1101, 1106 (9th Cir. 2004).

Where a state court decision is deemed "contrary to" or an "unreasonable application of" clearly established federal law, the reviewing court must next determine whether it resulted in constitutional error. *Benn v. Lambert*, 283 F.3d 1040, 1052 n. 6 (9th Cir. 2002). On habeas review, the court assesses the prejudicial impact of most constitutional errors by determining whether they "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 551 U.S. 112 (2007) (*Brecht* standard applies whether or not the state court recognized the error and reviewed it for harmlessness). The *Brecht* harmless error analysis also applies to habeas review of a

sentencing error. The test is whether such error had a "substantial and injurious effect" on the sentence. *Calderon v. Coleman*, 525 U.S. 141, 145-57 (1998) (holding that for habeas relief to be granted based on constitutional error in capital penalty phase, error must have had substantial and injurious effect on the jury's verdict in the penalty phase.); *Hernandez v. LaMarque*, 2006 WL 2411441 (N.D.Cal., Aug. 18, 2006) (finding that even if the evidence of three of petitioner's prior convictions was insufficient, petitioner was not prejudiced by the court's consideration of those convictions because the trial court found four other prior convictions which would have supported petitioner's sentence.) The Court will review Petitioner's claims under the applicable standard of review.

B. Ground One - Due Process Violation

In Ground One, Petitioner argues that the trial court violated his right to due process by failing to hold an evidentiary hearing on his motion to withdraw from the plea agreement (docket # 6 at 6) In his motion to withdraw, Petitioner asserted that the factual bases for his pleas were incorrect. (Respondents' Exh. V) Specifically, Petitioner explained that the factual bases were incorrect because, contrary to the facts recited by defense counsel during the change-of-plea hearing, Petitioner denied providing Tina Ricketts with a wig or disguise to impersonate Lucinda Maxfield. (Respondents' Exh. I at 5-8; Exh. V) The trial court denied the motion following oral argument, but not an evidentiary hearing, on the motion.

On post-conviction review, Petitioner challenged the trial court's failure to conduct an evidentiary hearing on the motion to withdraw. (Respondents' Exh. K) The post-conviction court rejected Petitioner's claim. (Respondents' Exh. L) The court noted that Petitioner's motion to withdraw was supported by "the general facts to which he expected the witnesses to testify." The court also noted that the motion included "a deposition transcript, and documentation from a forensic laboratory." (Respondents' Exh. L at 2) In rejecting Petitioner's claim, the court found that: "Defense counsel read the factual foundation for both counts into the record, and defendant agreed to the accuracy thereof." (Respondents' Exh. L at 2) The court further noted that the "detective who led the investigation . . . did not believe that the victim was involved or that the victim benefitted

from the scheme." (*Id.*) The post-conviction court concluded that Petitioner had "not shown error based on the Court's denial of his motion to withdraw from the plea agreement . . . ." (*Id*.) It further concluded that the court did not abuse its discretion in finding that Petitioner's pleas were made knowingly, intelligently, and voluntarily. (*Id*. at 2-3)

Petitioner has failed to establish that the state court's decision was contrary to, or involved an unreasonable application of, federal law. 28 U.S.C. § 2254. Petitioner pleaded guilty pursuant to a written plea agreement which the trial court accepted. Where a defendant pleads guilty, review is limited to whether the underlying plea was counseled and voluntary. *United States v. Broce*, 488 U.S. 563, 569 (1989); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (stating that to comport with due process, a guilty plea must be knowing and voluntary); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense of which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was [deficient.]").

The record demonstrates that Petitioner knowingly and voluntarily pleaded guilty without force, threats, or promises. (Respondents' Exh. F) At the change-of-plea hearing, Petitioner advised the court that he had reviewed the charges and the plea agreement with counsel. (Respondents' Exh. F at 6) Significantly, Petitioner attested to the accuracy of the factual bases for his guilty pleas. (Respondents' Exh. F at 12-13) Petitioner's "solemn declarations in open court carry a strong presumption of verity." *United States v. Rubalcaba*, 811 F.2d 491, 494 (9th Cir. 1987) (rejecting claim of involuntariness of guilty plea). In accepting Petitioner's guilty plea, the court noted that Petitioner had acknowledged that he was guilty as charged, there was a factual basis for Petitioner's pleas, and that he was aware of his rights and waived those rights knowingly and voluntarily. (Respondents' Exh. F at 14)

During the sentencing hearing, Scottsdale police detective, Paul Arnold, testified that he did not believe Lucinda Maxfield, the victim, was involved in the mortgage scheme. (Respondents' Exh. I at 15-17) Arnold testified that Petitioner provided crack cocaine to Maxfield to keep her in a drug-induced state so she would not be aware that Petitioner and Ricketts were obtaining a mortgage on Maxfield's property. (Respondents' Exh. I at 16) This testimony was consistent with the factual bases for Petitioner's guilty pleas provided at the change-of-plea hearing.

Petitioner has not established that the post-conviction court's rejection of his claim that he was entitled to withdraw from his guilty pleas due to the inaccurate factual bases is contrary to, or rests on an unreasonable application of, federal law. Although the state court neither explained its ruling nor cited United States Supreme Court precedent, this Court must look to Supreme Court precedent to determine whether the decision was a reasonable application of federal law. *Early v. Packer*, 537 U.S. 3, 8 (2002). The Supreme Court has held that citation to federal law is not required and that "a state court need not even be aware of [Supreme Court] precedent, 'so long as neither the reasoning nor the result of the state-court decision contradicts them.'" *Mitchell v. Esparaza*, 540 U.S. 12, 16 (2003) (citing *Early*, 537 U.S. at 8).

First, any deficiency in the factual bases for Petitioner's guilty pleas does not give rise to a constitutional violation. In federal court, Federal Rule of Criminal Procedure 11 requires that there be a factual basis for a guilty plea. Similarly, Arizona Rule of Criminal Procedure Rule 17.3 requires that, before the trial court may accept a guilty plea, it must satisfy itself that there is a factual basis for the plea. *State v. Herndon*, 109 Ariz. 147, 148, 506 P.2d 1041, 1042 (1973). However, neither the Rule 11 nor the Ariz.R.Crim. P. 17.3 procedure are "constitutionally mandated." *McCarthy v. United States*, 394 U.S. 459, 465 (1969). In other words, state courts are not constitutionally required to establish a factual basis for an otherwise voluntary and intelligent guilty plea. *See North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970); *Rodriguez v. Ricketts*, 777 F.2d 527, 528 (9th Cir. 1985) (concluding that "the due process clause does not impose on a state court the duty to

establish a factual basis for a guilty plea absent special circumstances.") Accordingly, to the extent that Petitioner challenges the state court's failure to comply with Ariz.R.Crim.P. 17.3, that claim is based solely on state law and is not cognizable on habeas corpus review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (explaining that "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.").

Moreover, the trial court's rejection of Petitioner's motion to withdraw from the guilty plea was not contrary to, or an unreasonable application of federal law, or based on an unreasonable determination of the facts. During the change-of-plea hearing, Petitioner himself advised the court that the factual bases for his pleas were accurate. Specifically, after counsel articulated the factual bases for the pleas, the court asked Petitioner if those facts were true. Petitioner responded affirmatively as to the factual basis for his guilty plea on each count. (Respondents' Exh. F at 12, 13) In *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977), the Supreme Court stated that although the defendant's representations at the time of the plea are not "invariably insurmountable," when a defendant later challenges the voluntariness of his plea, the defendant's representations, and any findings made by the trial court accepting the plea, "constitute a formidable barrier . . . . Solemn declarations in open court carry a strong presumption of verity." *See also Chizen v. Hunter*, 809 F.2d 560, 562 (9th Cir. 1986).

As previously stated, Petitioner argues that the trial court erred by failing to conduct an evidentiary hearing on Petitioner's motion to withdraw from the plea agreement based on his assertion that the factual bases for those pleas were inaccurate. Had that trial court held an evidentiary hearing, Petitioner essentially would have had testified that he had lied to the trial court during the change-of-plea hearing when he told the court that the factual bases for his guilty pleas were accurate. The court would have likely found this testimony unreliable. *See Graham v. Solem*, 728 F.2d 1533, 1540 (8th Cir. 1984). Moreover, Petitioner's credibility would have been impeached by the fact that during the change-of-plea hearing, he had the opportunity to explain any inaccuracies in the factual bases for his pleas, but rather stated that:

> I really don't have anything to say. It's a shame people [are] not interested in the truth, you know. We make up all these little stories but nobody knows the truth. It's really sad. But I see no other thing.

(Respondents' Exh. I at 19)

Finally, the record before the state court supported Petitioner's guilty pleas. Under Arizona law, the factual basis for a guilty plea may be determined from the extended record, including the pre-sentence report, preliminary hearing transcripts, the defendants' statements, proceedings before the grand jury, and other sources. *State v. Varela*, 120 Ariz. 596, 598, 587 P.2d 1173, 1175 (Ariz. 1978). During the change-of-plea hearing, Petitioner advised the court that the factual bases for his guilty pleas were accurate. Petitioner's subsequent statement that Maxfield was involved in the scam and that he did not provide Ricketts with a disguise to impersonate Maxfield, were contrary to the record. At the sentencing hearing, Scottsdale police detective Arnold advised the court that, in view of the evidence he had reviewed, Maxfield was not involved in the mortgage fraud and Petitioner was the "mastermind" of the scheme. (Respondents' Exh. I at 15-17) Petitioner's involvement with co-defendant Ricketts in committing the crimes against Maxfield was detailed in the police reports, which were cited in the pre-sentence report. (Respondents' Exh. S at 1)

Petitioner has not established that, if the court had held an evidentiary hearing on his motion to withdraw from the plea agreement, evidence would have been presented that would have called into question the accuracy of the factual bases articulated by defense counsel during the change-of-plea hearing. The pre-sentence report indicates that Ricketts pled guilty to Count One and to Count Five, taking the identity of another. (Respondents' Exh. S at 2) The addendum to Ricketts' plea agreement, which set forth the factual bases for her guilty pleas, was attached to the State's response to the Motion to Withdraw. (Respondents' Exh. T) That written factual basis establishes that: (1) the mortgage was obtained without Maxfield's knowledge or permission; (2) Ricketts pretended to be Maxfield; and (3) Ricketts wore a blonde wig provided by Petitioner as part of her disguise. (Respondents' Exh. T)

Furthermore, even if evidence was presented indicating that Maxfield was somehow involved in the mortgage scheme or that Ricketts created her disguise by herself, there would still be a sufficient factual basis for Petitioner's guilty plea. Petitioner knew about the scheme and benefitted when proceeds from the mortgage were wired to his "Richard Self" account. At sentencing, Petitioner's counsel conceded that any participation by Maxfield in the scheme, "does not exclude or excuse Mr. Jernigan's participation in this . . . ." (Respondents' Exh. I at 19-20) Additionally, the pre-sentence report noted that Petitioner admitted participating in the fraud, but attempted to minimize his culpability by claiming that he "did not initiate or organize this fraud." (Respondents' Exh. S at 3)

In view of foregoing, Petitioner has not shown that the state court's rejection of his challenge to the trial court's denial of his motion to withdraw his guilty pleas was contrary to, or an unreasonable application of, federal law.

B. Ground Two

In Ground Two, Petitioner asserts that trial counsel, Susan Maga, was ineffective at the change-of-plea hearing because she "provided an incorrect factual basis for the guilty plea." (docket # 6 at 7) Petitioner argues that the incorrect factual basis led the "court to conclude that petitioner was the mastermind behind the crime and his sentence was aggravated accordingly to a superaggravated sentence of 16.25 years." (docket # 6 at 7)

The controlling Supreme Court precedent on claims of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must show that counsel's performance was objectively deficient and that counsel's deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687; *Hart v. Gomez*, 174 F.3d 1067, 1069 (9th Cir. 1999). To be deficient, counsel's performance must fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. When reviewing counsel's performance, the court engages a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. *Strickland*, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of

counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Review of counsel's performance is "extremely limited." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir. 1998), *rev'd on other grounds*, 525 U.S. 141 (1998). "A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690. Acts or omissions that "might be considered sound trial strategy" do not constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 689.

To establish a Sixth Amendment violation, petitioner must also establish that he suffered prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 691-92; *United States v. Gonzalez-Lopez*, 548 U.S. 140,147 (2006) (stating that "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced.") To show prejudice, petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Hart*, 174 F.3d at 1069; *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998). To prove prejudice in the context of a guilty plea, petitioner must establish a reasonable probability that, but for counsel's deficient performance, he would not have accepted the offer but would have proceeded to trial. *Strickland*, 466 U.S. at 693. The court may proceed directly to the prejudice prong. *Jackson v. Calderon*, 211 F.3d 1148, 1155 n. 3 (9th Cir. 2000) (citing *Strickland*, 466 U.S. at 697). The court, however, may not assume prejudice solely from counsel's allegedly deficient performance. *Jackson*, 211 F.3d at 1155.

Petitioner fails to establish that counsel was ineffective. First, he has not shown that counsel's performance was deficient. The factual bases which attorney Maga set forth during the change-of-plea hearing were consistent with the record. The factual bases were consistent with the police reports and with the factual bases for the guilty pleas entered by co-defendant Ricketts. (Respondents' Exh. S at 1-2, Exh. T) During a settlement

conference, the prosecutor described the facts the State would prove at Petitioner's trial. (Respondents' Exh. U at 4-6) Petitioner did not contest the State's case, but rather entered a plea agreement. Additionally, at the change-of–plea hearing Petitioner advised the court that the factual bases articulated by counsel were accurate. (Respondents' Exh. F at 12, 13)

Petitioner has not presented any evidence supporting his allegation the factual bases for his guilty pleas were false, that Maxfield was involved in the scheme, or that he did not provide Ricketts with a blonde wig or otherwise assisted her impersonate Maxfield. Thus, Petitioner has not shown that counsel's performance was deficient with respect to the factual bases for Petitioner's guilty pleas.

Additionally, even assuming counsel's performance was deficient, Petitioner has not shown that he was prejudiced thereby. In other words, he has not established that but for counsel's deficient performance, he would have rejected the plea and proceeded to trial. *See Wanatee v. Ault*, 101 F.Supp.2d 1189, 1204 (N.D. Iowa 2000) (to show prejudice resulting from counsel's deficient advice, petitioner must offer more than self-serving statements; rather he must present credible, nonconclusory evidence that he would not have pleaded guilty had he been properly advised). Furthermore, even if counsel articulated inaccurate factual bases, those inaccuracies did not affect Petitioner's decision to plead guilty. Rather, Petitioner pled guilty despite his alleged knowledge that the factual bases were not true. *See Lipscomb v. Secretary*, 2008 WL 434881, * 10 (M.D.Fla., Feb. 14, 2008) (stating that "Lipscomb's acceptance of the favorable plea bargain was an informed election to forego further pursuit of his known claim that the victim's accusations were not true.") Also, Petitioner did not deny involvement in the scheme. Rather, he admitted participating in the scheme, but claimed that he "did not initiate or organize [it]." (Respondents' Exh. S at 3) He also conceded that any participation in the scheme by Maxfield, did not "exclude or excuse" his participation. (Respondents' Exh. I at 19-20)

Petitioner also argues that the alleged inaccuracies in the factual bases articulated by counsel led the court to believe Petitioner was the "mastermind," and to impose a super-aggravated sentence. (docket # 6 at 7) Contrary to Petitioner's assertion, the aggravated

sentence was not based on the court's conclusion that Petitioner was the mastermind behind the crime. Rather, the court found the following aggravating circumstances: (1) Petitioner's 1994 conviction, which Petitioner admitted; (2) the presence of an accomplice; and (3) the offense was committed for pecuniary gain. (Respondents' Exh. I at 22) Thus, even if defense counsel's factual bases wrongly led the court to consider Petitioner the mastermind, Petitioner was not prejudiced because this conclusion was unrelated to the aggravating circumstances supporting Petitioner's sentence. Moreover, even if the court concluded that Petitioner was the mastermind, there was sufficient evidence, aside from the factual bases set forth by defense counsel, from which the court could have reached that conclusion. The presentence report indicated that Petitioner orchestrated the scheme and that the State had made a more favorable plea offer to co-defendant Ricketts. (Respondents' Exh. S at 1-3) Additionally, Scottsdale police detective Arnold testified at sentencing that "the fact that [Petitioner] opened up a bank account using fictitious information, had a considerable amount of money wire transferred after directing Miss Ricketts to initiate that wire transfer to his account at Bank of America, then withdrew funds from the account, clearly led me to believe that he was the mastermind, that he did orchestrate and benefit from this." (Respondents' Exh. I at 16-17)

Additionally, Petitioner's subsequent counsel, Ms. Capozzi, made the court aware of Petitioner's position regarding his role in the scam. At sentencing, she told the court, "it's my client's strong position that Lucinda Maxfield was very much involved in this . . . .That, I understand, does not exclude or excuse Mr. Jernigan's participation in this, but I do believe those are some of the facts he's alluding to in this case." (Respondents' Exh. I at 19-20) The presentence report notes that, although Petitioner admitted participating in the fraud, he claimed that he "did not initiate or organize [it]." (Respondents' Exh. S at 3) Thus, even if counsel's factual bases inaccurately described Petitioner's role in the scheme, any inaccuracy was minimized by Petitioner's statements in the presentence report and attorney Capozzi's rebuttal at sentencing to the State's "mastermind" theory. *See Farrow v. United States*, 580 F.3d 1339, 1361 (9th Cir. 1978).

In conclusion, Petitioner fails to establish that counsel was ineffective with respect to the factual bases for his guilty pleas or for leading the court to believe that Petitioner was the mastermind behind the mortgage scheme.

C. Ground Three

In Ground Three, Petitioner asserts that counsel was ineffective for (a) not subpoenaing witness to support Petitioner's motion to withdraw from the plea agreement; and (b) not objecting to the trial court's failure to give advance notice that it intended to impose an exceptionally aggravated sentence on Count 1. (docket # 6 at 8)

The controlling Supreme Court precedent on claims of ineffective assistance of counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a petitioner must show that counsel's performance was objectively deficient and that counsel's deficient performance prejudiced the petitioner. *Strickland*, 466 U.S. at 687; *Hart v. Gomez*, 174 F.3d 1067, 1069 (9th Cir. 1999). To be deficient, counsel's performance must fall "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. When reviewing counsel's performance, the court engages a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment. *Strickland*, 466 U.S. at 690. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. Review of counsel's performance is "extremely limited." *Coleman v. Calderon*, 150 F.3d 1105, 1113 (9th Cir. 1998), *rev'd on other grounds*, 525 U.S. 141 (1998). Acts or omissions that "might be considered sound trial strategy" do not constitute ineffective assistance of counsel. *Strickland*, 466 U.S. at 689.

To establish a Sixth Amendment violation, petitioner must also establish that he suffered prejudice as a result of counsel's deficient performance. *Strickland*, 466 U.S. at 691-92; *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006) (stating that "a violation of the Sixth Amendment right to effective representation is not 'complete' until the defendant is prejudiced.") To show prejudice, petitioner must demonstrate a "reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Hart*, 174 F.3d at 1069; *Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998). The court may proceed directly to the prejudice prong. *Jackson v. Calderon*, 211 F.3d 1148, 1155 n. 3 (9th Cir. 2000) (citing *Strickland*, 466 U.S. at 697). The court, however, may not assume prejudice solely from counsel's allegedly deficient performance. *Jackson*, 211 F.3d at 1155.

Petitioner challenges attorney Capozzi's failure to subpoena the following four people as witnesses to testify in support of his motion to withdraw from the plea agreement: Lucinda Maxfield, David Robinson, William Flynn, and Stacey Scaife. (docket # 6 at 9) Whether to subpoena a witness is a strategic decision based on counsel's professional judgment. *Gustave v. United States*, 627 F.2d 901, 904 (9th Cir. 1980). Counsel in this case attempted to subpoena the foregoing persons, but advised the court that she was "unable to get return of service on those individuals." (Respondents' Exh. I at 4) Counsel asked for a continuance, but the court denied the motion because the matter had previously been continued. (Respondents' Exh. I at 4) Although counsel was unable to secure the attendance of the foregoing individuals in person, she supported the motion to withdraw Petitioner's guilty pleas with excerpts from Scaife's deposition in a civil case and forensic documentation. (Respondents' Exh. V, attachments) In view of the foregoing, counsel's performance was not deficient.

Additionally, Petitioner was not prejudiced by counsel's alleged deficient performance. The state court found that it did not need the testimony of Maxfield, Robinson, Flynn, or Scaife to decide the motion to withdraw. (Respondents' Exh. L) The court noted the motion to withdraw from the guilty plea "stated the general facts to which [Petitioner] expected the witnesses to testify and his position." (Respondents' Exh. l at 3) The motion also included Scaife's deposition transcript and documentation from a forensic laboratory regarding signatures by Lucinda Maxfield. (Respondents' Exh. L at 3; Exh. V, attachment) The court concluded that "Defendant has failed to show a reasonable

probability that the result of the proceeding would have been different had counsel secured the attendance of the witnesses at the hearing on the motion to withdraw the plea agreement." (Respondents' Exh. L at 3) Petitioner has not shown that the state court's decision was contrary to, or an unreasonable application, of federal law. 28 U.S.C. § 2254(d).

Petitioner has not presented any evidence regarding the testimony the four witnesses would have given that would have shown that the factual bases for Petitioner's guilty pleas were inaccurate. *Morgan v. Bunnell*, 24 F.3d 49, 53 (9th Cir. 1994) (stating that the court was not convinced that testimony of uncalled witnesses would have been helpful.) Petitioner has not presented any evidence indicating that there is a reasonable likelihood that Maxfield would have testified that she was involved in the scheme. Nor is there any indication that co-defendant Robinson would have contradicted the factual bases agreed to by both Ricketts and Petitioner. Indeed, Robinson previously admitted to the police that he received checks from Petitioner in exchange for "keeping the scheme hidden from Maxfield." (Respondents' Exh. S at 1) In support of the motion to withdraw, attorney Capozzi submitted excerpts from Scaife's deposition from a civil case. (Respondents' Exh. V, attachment) Petitioner has not explained William Flynn's relationship to this case, or described how his testimony would have persuaded the trial court that the factual bases were inaccurate and that Petitioner should be permitted to withdraw from his guilty pleas. In view of the foregoing, Petitioner fails to show that counsel was ineffective for failing to subpoena witnesses.

Petitioner further argues that counsel was ineffective for failing to object to the trial court's failure to give advance notice that it intended to impose super-aggravated sentence. Even assuming counsel was deficient for failing to raise this issue, Petitioner has not shown prejudice. There is nothing to suggest that, had counsel objected and the court continued sentencing, the court would not have found the three aggravating circumstances or would not have imposed the aggravated sentence.

IV. Conclusion

Based on the foregoing, the Amended Petition for Writ of Habeas Corpus be denied and dismissed.

Accordingly,

IT IS HEREBY RECOMMENDED that Petitioner's Amended Petition for Writ of Habeas Corpus (docket # 6) be **DENIED.**

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the District Court's judgment. The parties shall have ten days from the date of service of a copy of this recommendation within which to file specific written objections with the Court. *See,* 28 U.S.C. § 636(b)(1); Rules 72, 6(a), 6(e), Federal Rules of Civil Procedure. Thereafter, the parties have ten days within which to file a response to the objections. Failure timely to file objections to the Magistrate Judge's Report and Recommendation may result in the acceptance of the Report and Recommendation by the District Court without further review. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003). Failure timely to file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation. *See*, Rule 72, Federal Rules of Civil Procedure.

DATED this 23rd day of April, 2009.

Lawrence O. Anderson
United States Magistrate Judge